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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION

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STATEMENT OPPOSING JURISDICTION

The Judgment of the State Court Is Not Final

The California Supreme Court reversed the judgment of the trial court and gave no directions with respect to the disposition of the case by the lower court. The effect of this order was to return the case for a new trial.

Central Savings Bank of Oakland v. *Lake*, 201 Cal. 438, 443 (257 Pac. 521);
Monson v. *Fischer*, 219 Cal. 290, 291 (26 Pac. 2d 6);
Erlin v. *National Union Fire Ins. Company*, 7 Cal. 2d 547, 549 (61 Pac. 2d 756).

In the *Erlin* case the California Supreme Court said: "The reversal of the judgment was unqualified, that is to say, without direction to the trial court. Such a reversal

remands the case for a new trial and places the parties in the same position as if the case had never been tried."

Under the California practice appellant could, with the permission of the court, amend its complaint and it could produce other and further evidence in support of its contentions. Similarly, upon a new trial the trial court would have the power to make other and different findings of fact.

We are unable to conceive of any evidence which appellant could produce which would change the result. We believe that, acting under the compulsion of the doctrine of the law of the case, the trial court could do nothing except to enter judgment for appellee. We do not desire to delay a final determination of the cause upon the merits. But we can find no support in the decisions of this Court for the proposition that this judgment is final.

The trial court would act judicially, not ministerially, in entering a judgment for appellee and therefore the judgment is not final.

Schlosser v. *Hemphill*, 198 U. S. 173, 175;
Frazie v. *Orleans Dredging Co.*, 296 U. S. 653;
Bacon & Sons v. *Martin, Commissioner of Revenue*, 302 U. S. 642;
Crescent Creamery, Inc. v. *Milk Control Board*, 305 U. S. 559.

See also: Robertson and Kirkham: "The Jurisdiction of the Supreme Court of the United States," p. 50 *et seq.*

Boskey: "Finality of State Court Judgments Under the Federal Judicial Code," 43 Col. Law. Rev. 1002, 1015.

The Case Does Not Involve the Validity of a State Statute

The California Retail Sales Tax Act of 1933 (Stats. 1933, p. 2599) is a privilege tax levied upon retailers for the

privilege of engaging in business as retailers. The tax is measured by gross receipts from sales at retail.

Western Lithograph Company v. *State Board of Equalization*, 11 Cal. 2d 156, 64; 78 Pac. 2d 731; 117 A. L. R. 838.

The act by its own terms excludes from the measure of the tax the receipts of sales which the State is prohibited from taxing by the Constitution or laws of the United States. In 1937, when the sale in question was made, the applicable portion of the statute read as follows:

> "There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:
>
> "(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

(Retail Sales Tax Act Sec. 5; Stats. 1933, p. 2601.)[1]

While the validity of the statute was formally challenged by the pleadings, the point was not pressed in the briefs and neither the trial court nor the California Supreme Court referred to the validity of the statute in its opinion. A tax statute cannot be contrary to the Constitution when it specifically exempts from the measure of the tax those receipts from sales which the State is forbidden to tax by the Constitution. In this case the legislative mandate is clear. If the appellee exacted a tax from appellant in violation of its constitutional rights, it did so without legislative authorization or sanction.

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[1] Substantially the same provisions will be found in the Revenue and Taxation Code, Secs. 6351, 6352 (enacted 1941).

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 is not in point. The Kentucky statute challenged in that case contained no provision such as Section 5 of the California Retail Sales Tax Act.

The Federal Question Involved Is Unsubstantial

The taxpayer sold fuel oil and other petroleum products in California. This appeal involves a tax upon a sale of a single cargo of fuel oil to the government of New Zealand. The sale was consummated by delivery in the State of California.

This Court has thrice held that the delivery of merchandise to a purchaser within the borders of a State is a local event which is taxable even if the purchaser thereafter removes the goods from the State.

Superior Oil Company v. *State of Mississippi*, 280 U. S. 390;

Dept. of Treasury of Indiana v. *Wood Preserving Corporation*, 313 U. S. 62;

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340.

In the *Superior Oil* case the vendees were fishermen. They took the gasoline which they had purchased from the taxpayer out of the State on fishing boats and apparently consumed it while cruising in the Gulf of Mexico.

In the *Wood Preserving* case, the vendee was the Baltimore & Ohio Railroad. It purchased ties from the taxpayer which it transported over its own lines to a point in Ohio.

In the *International Harvester* case (Class "D" sales), the vendees were residents of Illinois who purchased trucks and farm equipment from the taxpayer. The trucks probably left the taxing state under their own power and the

farm implements were towed or carried in trucks across the State line.

There is no substantial basis for an argument that the activities of any of these local taxpayers would be viewed in a different light if the vendee had taken the merchandise across an international border. If the Superior Oil Co. had sold gasoline to Mexican fishermen at the docks in Biloxi, the transaction still would have been a local one. The nature of the Indiana transaction between the Wood Preserving Co. and the Baltimore & Ohio Railroad would not have been changed if the railroad had taken the ties to Ontario instead of Ohio. The sale of a truck to the Canadian Government would be a local Indiana transaction if Canada sent its employee to Indiana to accept delivery.

If the oil in question had been delivered to an American Naval Tanker for transport to Bremerton or Newport the power of the State to tax the local sale could not have been questioned. The transaction which California is now attempting to tax is likewise a local transaction. It is a transaction which the State can tax without burdening commerce, interstate or foreign.[2] It is a transaction which is not part of the commerce and it follows that it is not part of an export.

Appellant argues that to hold otherwise would destroy the effectiveness of the export-import clause. The decision in the *Wood Preserving* case did not destroy the effectiveness of the commerce clause for transactions of the character involved here are comparatively rare. The bulk of this country's exports move through normal channels of trade.

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[2] In the State courts appellant relied upon both the commerce clause and the export-import clause. It has abandoned its commerce clause contentions in this Court. Obviously, a tax which does not burden interstate commerce does not burden foreign commerce.

A foreign consumer seldom comes to this country with his own ship for the purpose of acquiring goods.

Appellant argues that the power to tax exports is not coextensive with the power to tax interstate commerce transactions. It is true, however, that any tax levied upon an export would be a burden on commerce. If, as appellant now concedes, this tax does not burden commerce, it cannot be classed as a tax on an export.

This Court has held that an "impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms."

Crew Levick Co. v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 295.

This Court has never applied Article I, Section 10, Clause 2 of the Constitution to strike down a State tax on exports where the commerce clause was not also applicable.[3]

As appellant has pointed out, the California Retail Sales Tax is levied upon retailers for the privilege of doing business at retail and it is measured by gross receipts from sales at retail. It is, therefore, unlike the tax involved in *A. G. Spalding & Bros.* v. *Edwards, Collector of Internal Revenue*, 262 U. S. 66. The tax involved there was an excise upon the goods measured by the selling price but it was described by the court as a tax upon the sale itself. In that case there was a delivery to a common carrier. Thus the *Spalding* case is distinguishable on several grounds. It involved a different kind of transaction, a different constitutional provision (Article 1, Section 9, Clause 5) and a different kind of tax.

If California had chosen to tax the privilege of manufac-

[3] In the case of imports an exception has been made in applying the original package doctrine (*Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652; 65 S. Ct. 870, 89 L. Ed. (Adv.) 852.

turing and had attempted to measure the tax by gross sales, the tax would have been valid. See:

American Manufacturing Company v. *City of St. Louis*, 250 U. S. 459;

R. J. Reynolds Tobacco Co. v. *Robertson, Collector of Internal Revenue*, 94 Fed. 2d 167 (cert. denied, 304 U. S. 563).

California has elected to tax the privilege of selling at retail. Only receipts from sales to a consumer are included in the measure of the tax. Only sales which are consummated by delivery within the State are considered. The tax could have no more effect on the price of goods exported than a tax on the privilege of manufacturing and, like that tax, it is directed at the exercise of a purely local privilege. The tax is imposed only when both the seller and the buyer are in the States. It is not calculated to burden exports or imports and it does not have that effect.

In *Brown* v. *Houston*, 114 U. S. 622, 629, the court said:

> "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine."

The California tax is not, then, a duty or impost on exports.

Conclusion

California oil companies have sold petroleum products to various foreign purchasers. Excluding sales where the California vendor made delivery in its own tankers and excluding sales where delivery was made by common carrier, taxes aggregating more than $1,700,000 have been

assessed on sales of this character by appellee. In addition, interest has accrued thereon in a considerable amount.

Measured in dollars and cents, the case is therefore important. It is submitted, however, that the issues are conclusively determined by the decisions herein cited and that the Federal question raised is unsubstantial.

Dated: Sacramento, California, February 1, 1946.

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